HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI

Writ Petition No.14373 of 2001

Between:

M.C. Jena …Petitioner

And

The Commandant, Central Industrial Security Force Unit, VSP, Visakhapatnam and others.

… Respondents

:: ORDER::

Counsel for the petitioner : Shri Krishnamurthy Devarakonda

Counsel for the respondents : Smt. C. Vani Reddy, Additional Standing Counsel for the Central Government

July 03, 2007

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Whether the punishment of removal from service imposed on the petitioner, who was then holding the post of Head Constable/Driver in the Central Industrial Security Force (CISF) and was found guilty of not carrying out the transfer order passed by the competent authority, is vitiated due to violation of the rules of natural justice or is shockingly disproportionate and calls for interference under Article 226 of the Constitution is the question which arises for determination in this petition.

The petitioner joined service as Head Constable/Driver in CISF on 2.2.1988. While he was serving in CISF Unit, Visakhapatnam Steel Plant at Visakhapatnam, Deputy Inspector General, South Zone, Chennai (respondent No.3 herein) vide his order dated 26.5.1998 transferred the petitioner to CISF Unit, RSTPS, Ramagundam, Karimnagar District. On 8.6.1998, movement order was issued requiring the petitioner to join at Ramagundam. After availing the joining time and 20 days sanctioned earned leave, the petitioner was supposed to join duty on 13.7.1998, but he did not do so. Instead, he sent a telegram to the concerned authority with a request to extend leave by stating that he was under medical treatment and that medical certificate would follow. This was followed by two undated and unsigned letters sent in the name of the petitioner, one of which was received by Commandant, CISF Unit, RSTPS, Ramagundam (respondent No.2 herein) on 17.7.1998 along with OPD ticket of District Head Quarters Hospital, Koraput for extension of leave. Since the letter was not accompanied by

unfitness certificate, respondent No.2 did not accept the same and sent letter dated 18.9.1998 to the petitioner to report for duty at Ramagundam along with relevant medical papers. Two more letters dated 8.10.1998 and 10.11.1998 were sent by respondent No.2 for the same purpose. In one of the letters, it was mentioned that if the petitioner fails to join duty, disciplinary action will be initiated against him. Notwithstanding this, the petitioner did not report for duty and sent an application dated 25.11.1998 for extension of leave. On 3.12.1998, respondent No.2 sent letter to the petitioner asking him to report for duty at CISF Unit, RSTPS, Ramagundam along with medical papers. On 13.2.1999, respondent No.2 sent the papers to the competent authority i.e. Commandant, CISF Unit, Vizag Steel Plant (respondent No.1 herein) for initiation of disciplinary action. The latter issued notice dated 19.3.1999 for holding an enquiry against the petitioner under Rule 34 of the Central Industrial Security Force Rules, 1969 (for short, 'the Rules'). The petitioner did not respond to the notice. Therefore, the disciplinary authority appointed respondent No.5 – Shri N.P. Reddy, Inspector (Executive), CISF Unit, HPCL, Vizag as the enquiry officer. Respondent No.5 fixed the date of preliminary hearing as 11.6.1999 and issued notice to the petitioner. He appeared before the enquiry officer and submitted that due to personal reasons and domestic problems, he could not join duty at Ramagundam, but assured that he will join duty without further delay. The next date of enquiry was fixed as 21.6.1999, but the petitioner did not attend appear before the enquiry officer. On two subsequent dates i.e. 29.6.1999 and 13.7.1999 also, the petitioner did not attend the enquiry. Therefore, after considering the statements of the departmental witnesses, namely, Sarvasri P. Rajendran (ASI), C. Senthamarai (SI) and G.L. Patel {Inspector

(Executive)} and the documents produced before him, respondent No.5 submitted report dated 20.7.1999 with the finding that the charge levelled against the petitioner has been proved. The relevant extracts of the enquiry report are reproduced below:

> **"FINDINGS:**
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> From the statements of PWs-I & PWs-II it is noted that HC/Dvr M.C. Jena was posted from CISF Unit, HPCL-VR, Vizag to CISF Unit, RSTPS, Ramagundam vide memorandum No.46/98 dated 26.5.98. From the statements of PWs-I, II & III it is noted that HC/Dvr M.C. Jena was given movement order No.E-38014/posting/CISF/HPCL/ 98/581 dated 08.6.98 to proceed on regular posting to CISF Unit, RSTPS, Ramagundam. The above movement order was acknowledged by the charged official on 8.6.98 and SOS from CISF Unit, HPCL-VR, Vizag from 09.6.98 (FN). Hon'ble Court/Dvr M.C.Jena was also grnated 20 days E/L alongwith joining time. After availing eligible joining time and sanctioned 20 days E/L, the charged official was supposed to report for duty in CISF Unit, RSTPS, Ramagundam on 13.7.98 (FN).
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> But the charged official failed to report at CISF Unit, RSTPS, Ramagundam stating "under medical treatment, please extend leave – follow to medical unfit certificate." Further the charged official sent an unsigned application stating that he met with an accident and under medical treatment for extension of leave alongwith medical OPD ticket of Dist.Hqrs. Hospital, Koraput.
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> But the application was not considered by Commandant, CISF Unit, RSTPS, Ramagundam as he was advised medical rest from 04.7.98 and also unfit certificate was not produced by the individual. Further, HC/Dvr M.C.Jena was directed to report to CISF Unit, RSTPS, Ramagundam vide letter No.E-38014/36/RSTPS®/Ad.I/98-3334 dated 18.9.98. Thereafter, two more call letters of even NOs. (3847) dated 08.10.98 and (4395) dated 20.11.98 were sent by the Commandant, CISF Unit, RSTPS, Ramagundam, but the individual did not report for duty. HC/Dvr M.C.Jena was again directed by Commandant, CISF Unit, RSTPS, Ramagundam vide letter of even No.4840 dated 03.4.99 to report to CISF Unit, RSTPS, Ramagundam. A letter No.E-38014/Posting/HPCL/98-1450 dated 24.11.98 was also sent by Deputy Commandant, CISF Unit, HPCL-VR, Vizag to HC/Dvr M.C.Jena to report to the new place of posting. But the charged official failed to report at CISF Unit, RSTPS, Ramagundam. PWs-I from RSTPS ® further stated that the charged official has not

reported in that unit till date.

CONCLUSION:

Basing on the above facts of the case, it clearly shows that HC/Dvr M.C. Jena has wontedly not joined his new place of posting. This action of HC/Dvr M.C.Jena not reporting to his new place of posting even after a lapse of one year shows wilfull disobedience of orders and dereliction of duty. Hence, I come to the conclusion that the charge framed against No.884480114 HC/Dvr M.C.Jena is "PROVED" beyond reasonable doubt."

A copy of the enquiry report was forwarded to the petitioner to enable him to submit his representation within 15 days, but he did not avail that opportunity. After waiting for about three months and ten days, respondent No.1 passed order

dated 19.1.2000 whereby he imposed the punishment of removal from service on the petitioner. Paragraphs 3, 4 and 5 of that order read as under:

" 3. I have carefully gone through the charge memorandum, enquiry report and other records available in the case file. During the course of enquiry, it has been established from Exhibit-1 and the statements of all the P.Ws. that the charged official was ordered to be posted out of CISF Unit, RSTPP, Ramagundam from CISF Unit, HPCL, Vizag and accordingly he had been issued with Movement order and had sanctioned 20 days EL together with joining time. He was relieved from CISF Unit, HPCL, Vizag on 8.6.98 vide Movement order dated 8.6.98. Though the charged official sent a telegram and an unsigned application to Commandant RSTPP, Ramagundam requesting to extend leave stating that he was met with an accident, he did not submit any supporting documents. Accordingly, the Commandant, CISF Unit, RSTPP, Ramagundam sent call up notices dated 10.9.98, 8.10.98 & 10/11.11.98 (PW-1, Exhibit-6, 7 & 8) respectively to his permanent address directing the charged official to report to the unit. But the charged official did not report to the unit. In turn, the charged official sent yet another application dated 25.11.98 to Commandant, RSTPP, Ramagundam for extension of leave without any supporting documents. It is not practicable to grant leave to a person without justifiable ground. On receipt of a copy of the letter dated 10/11.11.98 from Commandant, CISF Unit, RSTPP, Ramagundam, the Cy. Commandant, HPCL, Vizag was also sent a call-up letter to the

charged official vide his letter dated 24.11.98 (PW-2, Exhibit-1). But no information was received from the charged official.

4. In the light of the facts discussed above, I find that charged official is deliberately avoiding to report duty. Moreover, during the course of enquiry, the charged official sent a Resignation letter dated 12.4.99 to the undersigned to relieve him from service and to settle his dues against which he was communicated to report to the unit first to accept his resignation. But the charged official did not heed the instruction given to him and remained AWL without any justification for over a year. Even though the charged official was given reasonable opportunity, he failed to attend the enquiry on the dates fixed for the same. It clearly shows that the charged official is willfully absenting himself from duty without any justification/permission from the competent authority. I agree with the findings of the Enquiry Officer and hold the Hon'ble Court/DVR M.C. Jena guilty of the charge levelled against him. The act on the part of the charged official is unbecoming of a member of the disciplined Armed Force of the Union and also gives impression that he is not interested to serve in the Force.

5. The undersigned therefore in exercise of powers conferred upon me under Rule 29-A, Schedule-II, read in conjunction with Rule-31 (b) of CISF Rules, 1969, Award the punishment of "REMOVAL FROM SERVICE" to No.884480114 HC/Dvr M.C. Jena."

The appeal and revision preferred by the petitioner were dismissed by respondent No.3 and Inspector General, CISF, Mumbai (respondent No.4 herein) respectively vide their orders dated 5.5.2000 and 31.3.2001. Both the authorities independently considered all the points raised by the petitioner and concluded that there was no warrant for interfering with the punishment of removal.

The petitioner has questioned his removal on the following grounds:

1) the enquiry held by respondent No.5 is vitiated due to violation of the rules of natural justice because he i.e. the petitioner was not given fair opportunity to participate in the proceedings of enquiry;

2) he had produced medical documents to substantiate his plea

of illness, but neither the enquiry officer nor the disciplinary, appellate and revisional authorities considered the same;

3) the punishment of removal from service is extremely harsh and shockingly disproportionate to the misconduct found proved.

The case set up by the respondents is that the order of punishment was passed by respondent No.1 after giving full opportunity to the petitioner to represent his cause and defend himself. According to them, the petitioner neither filed reply to memo dated 19.3.1999 issued by respondent No.1 nor he participated in the enquiry. He did not even submit representation in the context of the findings recorded by the enquiry officer. In the counter-affidavit filed by him, Shri Joydeep Nayak, Commandant, CISF Unit, Visakhapatnam Steel Plant averred that in the past also penalty of stoppage of one increment with cumulative effect was imposed on the petitioner vide order dated 15.2.1990 because he was found guilty of selling Diesel from CISF bus. The deponent has further averred that the petitioner did not produce any evidence to substantiate his claim that he was unable to join duty due to injury and the OPD ticket produced by him was not treated sufficient for extension of his leave.

Shri Krishnamurthy Devarakonda argued that the order of punishment is liable to be quashed because the petitioner was given reasonable opportunity to defend himself. He further argued that the finding of guilty recorded by respondent No.5 is liable to be declared perverse because it is not based on a correct appreciation of evidence produced during the enquiry. Shri Krishnamurthy emphasized that the petitioner had informed respondent No.3 as early as on 4.7.1998 that he will not be able to join duty on account of

injury suffered due to accident which took place in the course of repair of his house, but the officer concerned arbitrarily ignored the same and manipulated the initiation of inquiry on the charge of failure to report for duty at Ramagundam. Learned counsel then argued that even if the Court comes to the conclusion that the enquiry is not vitiated due to violation of the rules of natural justice and the finding recorded by respondent No.5 is based on correct appreciation of evidence, the punishment of removal from service imposed on the petitioner should be declared as shockingly disproportionate and quashed. In support of this argument, the learned counsel relied on the judgments of the Supreme Court in **S.K.Giri v. Home Secy., Ministry of Home Affairs**[1] and **Shri Bhagwan Lal Arya v. Commr. of Police**[2]. Shri Krishnamurthy referred to Section 61 of the Central Industrial Security Force Act, 1968 (for short, 'the Act') and Rules 19 (3) and 38 of the Central Civil Services (Leave) Rules, 1972 and argued that respondents were duty bound to constitute a Medical Board to assess the medical fitness of the petitioner and their failure to do so has resulted in manifest injustice to his client. He then submitted that respondent No.1 should have, instead of removing the petitioner from service, retired him on invalid pension.

Smt.C. Vani Reddy produced the original record of enquiry to show that respondent No.5 had given ample opportunity to the petitioner to defend himself and argued that the latter has to blame himself because he did not attend the enquiry on 21.6.1999, 29.6.1999 and 13.7.1999 when statements of the departmental witnesses were recorded and documents produced by them were taken on record. Learned counsel submitted that the finding of guilty recorded by the enquiry officer is based on correct appreciation of

evidence and the same does not call for interference under Article 226 of the Constitution of India. In support of this submission, learned counsel relied on the statements of Sarvashri P. Rajendran, C. Senthamarai and G.L. Patel. She then argued that the punishment of removal from service imposed on the petitioner cannot be termed as arbitrary or shockingly disproportionate because the petitioner was found guilty of gross misconduct of not carrying out the order of transfer and the disciplinary authority had rightly imposed the penalty of removal keeping in view the gravity of misconduct found proved and recalcitrant attitude exhibited by him by not reporting to duty till the initiation of disciplinary action and even thereafter. Smt.Vani Reddy pointed out that in 1990, one increment of the petitioner was stopped with cumulative effect because he was found of selling Diesel from CISF bus and submitted that the Court may not exercise the power of judicial review to modify the punishment imposed by the competent authority.

I have given serious thought to the entire matter and carefully scrutinised the record of enquiry, the order of punishment as well as the appellate and revisional orders and pleadings of the parties. It is settled law that the High Court's power of judicial review of the disciplinary action against the delinquent employee is very limited. The High Court can interfere with the order of punishment if it is found to be vitiated due to violation of the statutory rules or regulations or the principles of natural justice and such violation is found to have prejudiced the cause of the delinquent. The High Court can also nullify the order of punishment if the finding of guilty recorded by the enquiring/ disciplinary authority is based on no evidence or is influenced by extraneous factors/considerations. The doctrine of proportionality and Wednesbury Rule can be invoked by the High

Court if it is convinced that the punishment imposed by the employer is per se arbitrary/capricious or wholly disproportionate to the misconduct found proved. Of course, the last mentioned ground is not available in cases involving fraud, misrepresentation or misappropriation/embezzlement of public funds.

The parameters for exercise of the High Court's power to issue a writ of certiorari are also well defined. A writ, order or direction can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals or quasi-judicial authorities. A writ can also be issued where in exercise of jurisdiction conferred on it, the Court or the Tribunal or quasi-judicial authority acts illegally or improperly, i.e., it decides a question without giving an opportunity of hearing to the party affected by the order or where the procedure adopted by it is opposed to the principles of natural justice. However, it must be remembered that the jurisdiction of the High Court to issue a writ of certiorari is supervisory in nature and not appellate one. This necessarily means that the finding of fact reached by the inferior Court, Tribunal, etc., as a result of the appreciation of evidence, cannot be reopened or questioned in writ proceedings except when the judgment, order or award suffers from an error of law apparent on the face of the record. An error of law is one which can be discovered on a bare reading of the judgment, order or award under challenge along with the documents which have been relied upon by the inferior Court, Tribunal or quasi-judicial authority. An error, the discovery of which is possible only after a detailed scrutiny of the evidence produced by the parties and lengthy debate at the bar cannot be regarded as an error of law for the purpose of a writ of certiorari. A finding of fact recorded by an inferior Court or Tribunal or quasi-judicial authority can be corrected only if it is shown that in recording

the said finding, the Court etc., had erroneously admitted inadmissible evidence and the same has influenced the impugned finding. Similarly, a finding of fact based on no evidence would be regarded as error of law which can be corrected by issuing a writ of certiorari. However, sufficiency or adequacy of the evidence relied upon by the inferior Court or Tribunal or quasi-judicial authority cannot be gone into by the High Court while considering the prayer for issue of a writ of certiorari. Likewise, mere possibility of forming a different opinion on re-appreciation of evidence produced by the parties is not sufficient for issue of a writ of certiorari.

I may now notice some judicial precedents in which extent of the court's power of judicial review of disciplinary action has been considered. In **State of Orissa v. Bidyabhushan Mohapatra**[3], the Supreme Court considered whether the High Court can interfere with the order of punishment simply because finding recorded by the enquiry officer in respect of some charges is found to be vitiated by an error of law and whether it can go into the sufficiency and adequacy of punishment. While reversing the order of Orissa High Court, which had allowed the writ petition filed by the respondent, their Lordships of the Supreme Court observed:

> "But the Court in a case in which an order of dismissal of a public servant is impugned is not concerned to decide whether the sentence imposed, provided it is justified by the rules, is appropriate having regard to the gravity of the misdemeanour established. The reasons which induce the punishing authority, if there has been an inquiry consistent with the prescribed rules, are not justiciable: nor is the penalty open to review by the Court. If the High Court is satisfied that if some but not all of the findings of the Tribunal were 'unassailable', the order of the Governor on whose powers by the rules no restrictions in determining the appropriate punishment are placed, was final, and the High Court had no

jurisdiction to direct the Governor to review the penalty for as we have already observed the order of dismissal passed by a competent authority on a public servant, if the conditions of the constitutional protection have been complied with, is not justiciable. Therefore if the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The Court has no jurisdiction if the findings of the inquiry officer or the Tribunal prima facie make out a case of misdemeanour, to direct the authority to reconsider that order because in respect of some of the findings but not all it appears that there had been violation of the rules of natural justice."

In **State of A.P. v. Sree Rama Rao**[4], the Supreme Court indirectly reiterated the proposition laid down in **Bidyabhushan Mohapatra** (supra) and held:

"The High Court is not constituted in a proceeding under Article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental inquiry against a public servant; it is concerned to determine whether the inquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the inquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of inquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the

inquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which the findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding under Article 226 of the Constitution."

In **State of Madras v. G. Sundaram**[5], the Constitution Bench of the Supreme Court laid down the following proposition:

"High Court, in the exercise of its jurisdiction under Article 226 of the Constitution, cannot sit in appeal over the findings of fact recorded by a competent Tribunal in a properly conducted departmental enquiry except when it be shown that the impugned findings were not supported by any evidence. It cannot consider adequacy of that evidence to sustain the charge."

In **State of A.P. v. C. Venkata Rao**[6], a three Judges Bench of the Supreme Court held as under:

"In considering whether a public officer is guilty of misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the Court need not be applied. Even if that rule is not applied by a domestic tribunal in any inquiry the High Court in a petition under Article 226 of the Constitution is not competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court is not a court of appeal under Article 226 over the decision of the authorities holding a departmental enquiry against a public servant. The Court is concerned to determine whether the enquiry is held by an authority competent in that behalf and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court to review the evidence and to arrive at an independent finding on the evidence. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. A finding

of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal."

(emphasis supplied)

In **B.C. Chaturvedi v. Union of India**[7], the Supreme Court, while considering the appellant's challenge to the order of punishment passed as a sequel to the departmental enquiry held against him, highlighted the limited scope of judicial review by making the following observations:

"Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to re-appreciate the evidence or the nature of punishment. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority

held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of that case."

In **Apparel Export Promotion Council v. A.K. Chopra**[8], the Supreme Court again considered the High Court's power to interfere with the disciplinary proceedings and held:

"It is a settled position that in departmental proceedings, the disciplinary authority is the sole judge of facts and in case an appeal is presented to the appellate authority, the appellate authority has also the power/and jurisdiction to reappreciate the evidence and come to its own conclusion, on facts, being the sole fact-finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in writ jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and/or legally untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. Since the High Court does not sit as an appellate authority over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot, normally speaking, substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities. Even insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the disciplinary or the departmental appellate authority, is either impermissible or such that it shocks the conscience of the High Court, it should not normally substitute its own opinion and impose some other punishment or penalty.

Further, it is a well-settled principle that even though judicial review of administrative action must remain flexible and its dimension not closed, yet the court, in exercise of the power of judicial review, is *not* concerned with the *correctness* of the findings of fact on the basis of which the orders are made so long

as those findings are reasonably supported by evidence and have been arrived at through proceedings which cannot be faulted with for procedural illegalities or irregularities which vitiate the process by which the decision was arrived at. Judicial review, it must be remembered, is directed not against the decision, but is confined to the examination of the decision-making process.

Judicial review, not being an appeal from a decision, but a review of the manner in which the decision was arrived at, the court, while exercising the power of judicial review, must remain conscious of the fact that if the decision has been arrived at by the administrative authority after following the principles established by law and the rules of natural justice and the individual has received a fair treatment to meet the case against him, the court cannot substitute its judgment for that of the administrative authority on a matter which fell squarely within the sphere of jurisdiction of that authority."

The applicability of the doctrine of proportionality

In **Ranjit Thakur v. Union of India**[9], the Supreme Court applied the 'doctrine of proportionality' and interfered with the discretion exercised by the employer to punish delinquent employee. Some of the observations made in that judgment are extracted below:

"Judicial review generally speaking, is not directed against a decision, but is directed against the "decision-making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review."

In **Union of India v. G. Ganayutham**[10], the doctrine of proportionality was considered along with Wednesbury rule and the following propositions were laid down:

> "(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury test.
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> (2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational – in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU principles.
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> (3) (a) As per Bugdaycay, Brind and Smith as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.
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> (3) (b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.
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> (4) (a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgent of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or

administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of "proportionality" and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14."

In **State Bank of India v. Samrendra Kishore Endow**[11], **State of Uttar Pradesh v. Ashok Kumar Singh**[12], **State of Uttar Pradesh v. Nandkishore Shukla**[13], **State of Punjab v. Baxi Singh**[14], **Uttar Pradesh State Road Transport Corporation v. A.K. Parul**[15], **Union of India v. J.R. Gheman**[16], the Supreme Court disapproved invoking of the doctrine of proportionality by the High Courts.

I n **Om Kumar v. Union of India**[17], the Supreme Court considered the applicability of the 'doctrine of proportionality' in the context of Article 14 of the Constitution, referred to the judgments in **Ranjit Thakur v. Union of India** (supra), **B.C. Chaturvedi v. Union of India**[18] and held:

"1) In this context, we shall only refer to these cases. In **Ranjit Thakur v. Union of India** this Court referred to "proportionality" in the quantum of punishment but the Court observed that the punishment was "shockingly" disproportionate to the misconduct proved. In **B.C. Chaturvedi v. Union of India** this Court stated that the court will not interfere unless the punishment awarded was one which shocked the conscience of the court. Even then, the court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the court could award an alternative

penalty. It was also so stated in **Ganayutham**."

2) Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment."

In **Regional Manager, U.P. SRTC v. Hoti Lal**[19], the Supreme Court outlined the mode to be adopted for determining whether the punishment imposed by the disciplinary authority is shockingly disproportionate and observed as under:

"The Court or tribunal while dealing with the quantum of punishment has to record reasons as to why it is felt that the punishment was not commensurate with the proved charges. The scope for interference is very limited and restricted to exceptional cases. In the impugned order of the High Court no reasons whatsoever have been indicated as to why the punishment was considered disproportionate. Failure to give reasons amounts to denial of justice. A mere statement that it is disproportionate would not suffice. It is not only the amount involved by the mental set-up, the type of duty performed and similar relevant circumstances which go into the decision-making process while considering whether the punishment is proportionate or disproportionate. If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptional." (underlining is mine)

In **Director General, RPF v. Ch. Sai Babu**[20], the Supreme Court reiterated that the High Court should ordinarily not interfere with the discretion exercised by the disciplinary authority in the matter of imposition of punishment and observed:

> "Normally, the punishment imposed by a disciplinary authority should not be disturbed by the High Court or a tribunal except in appropriate cases that too only after reaching a conclusion that the punishment imposed is grossly or shockingly disproportionate, after examining all the relevant factors including the nature of the charges proved, the past conduct, penalty imposed earlier, the nature of duties assigned having due regard to their sensitiveness, exactness expected and discipline required to be maintained, and the department/establishment in which the delinquent person concerned works."

The views expressed in the above noted cases have been reiterated in the recent judgments – **Hombe Gowda Educational Trust v. State of Karnataka**[21], **Commissioner of Police v. Syed Hussain**[22], and **State of U.P. v. Sheo Shanker Lal Srivastava**[23].

In the backdrop of the above noted factual and legal position, I shall now consider whether the enquiry held against the petitioner is vitiated due to violation of the rules of natural justice and whether the finding recorded by the enquiry officer, which was accepted by the disciplinary authority, is vitiated by an error of law apparent on the face of the record.

A recapitulation of the facts shows that despite repeated reminders, the petitioner did not comply with the order of transfer necessitating initiation of departmental enquiry. He was served with charge sheet and was given notices to appear before the enquiry officer. He attended the first date of enquiry, but absented on all

subsequent dates. This left the enquiry officer (respondent No.5) with no option but to hold ex parte enquiry and submit report dated 20.7.1999 with the finding that the charge has been proved against the delinquent. The petitioner was supplied copy of the enquiry report, but he did not make any complaint regarding the violation of the rules of natural justice. It is not even the pleaded case of the petitioner nor the learned counsel argued that his client had not received notices issued by the enquiry officer or that he was not allowed to defend himself. Therefore, at this stage, he cannot be allowed to contend that the enquiry was held in violation of the rules of natural justice.

A reading of the enquiry report dated 20.7.1999 shows that respondent No.5 minutely analysed the statements of the three witnesses examined by the department and the documents produced by them and recorded an unequivocal finding that the charge of disobedience of the order of transfer and dereliction of duty has been proved against the delinquent. Respondent No.1 independently scrutinised the record of enquiry and recorded his agreement with the enquiry officer. Shri Krishnamurthy Devarakonda could not point out any mistake in the analysis of evidence by respondent No.5 and consideration of the enquiry report by respondent No.1. He also could not show that the finding of guilty is based on irrelevant or extraneous factors or that respondent No.5 and/or respondent No.1 overlooked any material piece of evidence. Therefore, this Court cannot sit in appeal over the findings and conclusion recorded by respondent Nos.5 and 1 respectively and set aside the order of punishment by making a wild assumption that the finding of guilty is not based on legally admissible evidence or that a different view could have been taken. At the cost of repetition, I deem it proper to

observe that while examining challenge to the finding recorded by the enquiry officer or the order of punishment passed by the disciplinary authority, this Court cannot go into the sufficiency or adequacy of evidence.

The question which remains to be considered is whether the punishment of removal from service imposed by respondent No.1 is ex facie arbitrary or is shockingly disproportionate warranting invoking of the doctrine of proportionality. The application of the doctrine of proportionality is always a tricky issue. While punishing an employee found guilty of misconduct, the employer/competent authority is required to take into account the total length of service of the delinquent and his past record, the gravity of misconduct found proved and its impact on the establishment, organisation or department. The discretion exercised by the employer in this regard cannot be lightly interfered by the courts. In such cases, the court's power of judicial review is extremely limited. The discretion of the employer can be tinkered only when the conscience of the Presiding Officer of the court is shocked by the degree of punishment and not otherwise. Under no circumstance, the court can exercise appellate power and interfere with the employer's prerogative simply because it feels that a different view could have been taken.

The plea of compassion put forward by Shri Krishnamurthy Devarakonda may appear attractive in the first blush, but this Court cannot sympathise with the petitioner, who has been found guilty of gross misconduct, and interfere with the discretion exercised by the competent authority. It is always the prerogative of the employer to maintain discipline among the employees. The rigor of discipline is bound to be greater in the cases of employees in uniform and in

exercise of the power of judicial review, the Court will be extremely reluctant to substitute its opinion qua that of the employer regarding the measures to be taken to inculcate the sense of discipline among the employees and take punitive measures against those found guilty of misconduct. The degree of restraint exercised by the constitutional courts in interfering with the employer's right to discipline the employees is evinced from various judgments to which reference has been made hereinabove. However, a mention of one more judgment of the Supreme Court in **Gujarat Electricity Board v. Atmaram**[24] is appropriate. The facts of that case were that the respondent, who was holding the post of Deputy Engineer in Gujarat Electricity Board, failed to carryout the order of transfer even after his representation for cancellation of that order was rejected. The competent authority took serious view of the non-compliance of the order of transfer and terminated the service of the respondent by invoking Clause 113 of the Service Regulations. A learned Single Judge of Gujarat High Court quashed the order of termination on the ground of violation of the rules of natural justice. The Division Bench dismissed the appeal preferred by the appellant. The Supreme Court reversed the judgment of the Division Bench and held:

> "Transfer of a government servant appointed to a particular cadre of transferable posts from one place to the other is an incident of service. No government servant or employee of Public Undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of

transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance with the transfer order, he would expose himself to disciplinary action under the relevant rules, as has happened in the instant case.

No government servant or employee of any public undertaking has a right to be absent from duty without sanction of leave, merely on account of pendency of representation against the order of transfer. Regulation 113 of the Service Regulations contemplates that before exercising power thereunder for summarily discharging an employee from the service of the Gujarat State Electricity Board without complying with the procedure prescribed for taking disciplinary action, two conditions must be satisfied; firstly, the employee must be found to be absent from duty without leave or overstaying the period of sanctioned leave, and, secondly, he failed to join his duty even after a warning. The object and purpose of giving warning is to remind the delinquent employee that if he continues to be absent from duty he would be liable to action under Regulation 113 and to afford him an opportunity to make amends by joining his duty. If even thereafter he fails to join duty, his services are liable to be terminated by an order of discharge. A warning need not be in any particular form."

The facts of this case show that even though the petitioner was required to report for duty at RSTPS, Ramagundam by 13.7.1998, he failed to do so. He not only defied the order of transfer, but ignored various communications sent by respondent No.2 asking him to report for duty at the transferred place. The applications sent by the petitioner for extension of leave were not entertained by the competent authority because the same were not accompanied by medical certificate except the OPD ticket issued by District Head Quarters Hospital, Koraput (Orissa). The petitioner did not attend the enquiry proceedings and did not produce documents to substantiate his plea that he was unable to join at Ramagundam because of injury caused in the accident. Even after initiation of enquiry on 19.3.1999

and till its conclusion in July, 1999, the petitioner neither reported for duty nor produced the medical certificate. All this shows that he was not prepared to join at Ramagundam and the theory of injury etc. was concocted by him to justify non-compliance of the transfer order. Therefore, the discretion exercised by respondent No.1 to impose the punishment of removal from service cannot be termed as arbitrary or serious enough to shock the conscience of the Court. The punishment of stoppage of one grade increment with cumulative effect imposed on the petitioner in 1990 and the nature of misconduct found proved against him are sufficient to negate the possibility of any judicial intervention in the matter.

The argument of Shri Krishnamurthy that the respondents should have constituted a Medical Board to examine the petitioner and he should have been retired on invalid pension are being mentioned by me only to be rejected because, at no point of time the petitioner came forward with the request for being sent for medical examination. Rule 38 of the Central Civil Services (Leave) Rules, 1972 on which reliance has been placed by the learned counsel can be invoked only if an employee is retired on account of bodily or mental infirmity. The petitioner's case does not fall under that rule because he was found guilty of grave misconduct.

The judgments on which reliance has been placed by Shri Krishnamurthy Devarakonda are clearly distinguishable. In the first case, the Supreme Court ordered reinstatement of the appellant because he was found guilty of remaining absent only for about 25 minutes in 12 years of service. In the second case, the absence from duty was not treated as grave misconduct. The present one is not a case of absence from duty, but of disobedience of a lawful order passed by the competent authority. Not only this, the petitioner had

been punished on an earlier occasion for another act of grave misconduct i.e. sale of Diesel from CISF bus. Therefore, the above noted two judgments cannot be pressed into service for ordering his reinstatement.

No other point has been argued.

In the result, the writ petition is dismissed.

G.S. SINGHVI, CJ

July 03, 2007

Note: LR copy be marked.

svs

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[1] 1995 Supp (3) SCC 519
[2] (2004) 4 SCC 560
[3] AIR 1963 SC 779
[4] AIR 1963 SC 1723
[5] AIR 1965 SC 1103
[6] AIR 1975 SC 2151
[7] (1995) 6 SCC 749
[8] (1999) 1 SCC 759
[9] (1987) 4 SCC 611
[10] (1997) 7 SCC 463
[11] (1994) 2 SCC 537
[12] (1996) 1 SCC 302
[13] (1996) 3 SCC 750
[14] (1997) 6 SCC 381
[15] (1998) 9 SCC 416
[16] (1999) 6 SCC 403

[17] (2001) 2 SCC 386

[18] (1995) 6 SCC 749

[19] (2003) 3 SCC 605

[20] (2003) 4 SCC 331

[21] (2006) 1 SCC 430

[22] (2006) 3 SCC 173

[23] (2006) 3 SCC 276

[24] (1989) 2 SCC 602